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Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 781

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Rules, appellees E. I. du Pont de Nemours and Company and General Motors Corporation move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant do not warrant full briefs and argument.

STATEMENT

This is the second occasion on which this proceeding has been in this Court. On December 9, 1954, the District Court, pursuant to a lengthy opinion (126 F. Supp. 235), entered an order dismissing the complaint filed against appellees, and others, alleging a combination and conspiracy in violation of Section 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat.

209; U.S.C., Title 15, Secs. 1 and 2) and a violation by appellee du Pont of Section 7 of the Clayton Act. (Act of October 15, 1914, 38 Stat. 730; U.S.C. Title 15, Sec. 18). On appeal by appellant, this Court found that du Pont had violated Section 7 of the Clayton Act. 353 U.S. 586. The mandate of this Court remanded the case "for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute." In taking such action, the Court noted that "The District Courts, in the framing of equitable decrees, are clothed with large discretion to model their judgments to fit the exigencies of the particular case." *Id.* at p. 607.

Pursuant to that mandate, the District Court established a schedule for further proceedings, and appointed two *amici curiae,* Andrew J. Dallstream and Manuel A. Cowen, both of the Illinois bar, to advise the court with respect to the interests of the du Pont and General Motors stockholders, respectively. Proposed final judgments were filed by appellant, by appellees, and by each of the *amici.* Thereafter, a full hearing was had on the several proposals.[1] After briefs and proposed findings of fact had been filed by all parties and further memoranda filed by the *amici,* the court, on October 2, 1959, filed a comprehensive opinion, which constituted its findings of fact and conclusions of law, and which outlined the nature of the judgment which the court believed it should enter.

On November 17, 1959, the court entered the judgment from which this appeal is taken. The judgment

[1] The hearings began on February 16, 1959; and ended on April 9, 1959. The printed transcript comprises 3039 pages, some 57 witnesses were heard, and over 600 exhibits were received in evidence.

divests du Pont of all voting rights in General Motors stock and of the right to be represented on the Board of General Motors. In addition, the judgment in sweeping and specific terms prohibits du Pont, Christiana and Delaware and their officers and directors from influencing or attempting to influence the affairs of General Motors in any manner whatsoever. More specifically, the judgment provides that the voting rights on the General Motors stock to which du Pont will continue to hold the bare legal title will be exercised *pro rata* by the du Pont stockholders, except that the judgment bars the exercise of voting rights on any General Motors stock—either on the shares held by du Pont or stock owned directly—by Christiana, Delaware, the officers and directors of du Pont, Christiana and Delaware, and the members of the officers' and directors' families residing in the same household with them. Arts. VI, VII. General Motors, on the one hand, and du Pont, Christiana and Delaware on the other, are enjoined from having common directors, officers and employees, and the latter companies are likewise enjoined from nominating or proposing any person for election as a General Motors director or appointment as a General Motors officer. Art. IV. A series of injunctive provisions (Art. V) requires du Pont and General Motors to cancel and terminate all requirements contracts and joint ventures with each other and prohibits them from entering into such arrangements in the future and from dealing with each other on a non-competitive or preferential basis. Specific provisions for reexamination and modification of the judgment are provided in case of changes in the tax laws, or in the event the judgment does not prove adequate to remedy the violation. Art. IX.

APPELLANT'S CONTENTIONS ARE WITHOUT SUBSTANCE

Since the judgment divests du Pont of all incidents and attributes of ownership of its General Motors stock which could or might influence the conduct of General Motors, and otherwise insures that du Pont will not be treated preferentially by General Motors, the issue on this appeal is not whether there shall be divestiture which is effective to satisfy the requirements of Section 7 of the Clayton Act. The issue is rather whether punishment—in the form of harsh and unprecedented tax consequences and depreciated market values—shall be inflicted upon the stockholders of du Pont and General Motors.

Appellant insists that this punishment may, and indeed must, be inflicted on the ground that otherwise the judgment will not operate upon the bare legal title to the stock. In practical terms, the ultimate question raised by appellant's contention is whether, with the stock stripped of all aspects of ownership significant to the violation of the statute, the judgment below is defective because the legal abstraction of "title" will be represented by one piece of paper in a vault in Wilmington rather than by thousands of pieces of paper in the hands of du Pont's stockholders.[2] The

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[2] Under the judgment this "title" is virtually meaningless. Dividends to du Pont on the General Motors stock have for many years been passed on promptly by du Pont to its stockholders and du Pont intends that this practice shall continue (Opinion, p. 74); indeed, appellant attached so little importance to the dividends that it did not at any time ask the court below to order that du Pont should continue to pass them on. Apart from dividends, "title" under the judgment means only the right, in the event of a dissolution or liquidation of General Motors, to share pro rata in any assets remaining after the payment of all debts and obligations.

resolution of this question on appellant's terms would not affect the corporate operations of either du Pont or General Motors; it would not reduce the size or limit the economic power of either company; it would not remove or prevent restraints of trade, and it would have no other economic consequences in any way relevant to the purposes of Section 7.

On the other hand, the legal abstraction of "title", although irrelevant for antitrust purposes, has significant consequences under the tax laws. A judgment which operated upon the legal title to the stock would impose upon the shareholders of du Pont harsh tax consequences which would be abnormal, in the sense that they would arise from a fortuitous circumstance unrelated to the usual purposes and operation of the revenue statutes, and not as a result of any voluntary conduct on the part of those who must pay the tax. What is more, that kind of a judgment would force upon the market, within some limited period of time, enormous quantities of the stock of General Motors and thereby, through the operation of the forces of demand and supply, depreciate the value of all General Motors stock and not merely that held by the du Pont Company. As a result all the stockholders of General Motors would suffer losses because of events for which they had no legal or moral responsibility.

The appellant attempts to justify its position by two lines of argument. First, appellant urges that, as a matter of law, the District Court had no discretion under Section 15 of the Clayton Act to enter a final judgment which leaves in du Pont the bare legal title to the General Motors stock. Second, and alternatively, appellant urges that if the District Court had such discretion, it exercised it wrongly. The first

contention is refuted by the express language and the history of the statute, and the mandate of this Court. The second contention ignores the practical and equitable problems to which the District Court carefully addressed itself, the efficacy of the final judgment in eliminating the effects of the acquisition offensive to the statute, and the safeguards which are contained in that judgment. Neither contention, we submit, requires or warrants full briefs and argument in this Court.

I

DIVESTITURE OF THE BARE LEGAL TITLE TO THE STOCK IS NOT MANDATORY UNDER SECTION 15 OF THE CLAYTON ACT

Appellant urges (Jur. St., pp. 8-10) that the District Court had no jurisdiction under Section 15 of the Clayton Act to enter any order other than one which would divest du Pont of every aspect of ownership of the General Motors stock, including even its naked legal title. Discretion would remain only as to the time and method of divestiture. This contention was thoroughly canvassed, and rejected, by the court below (Opinion, pp. 19-24). Its conclusion is so clearly correct as not to give rise to a substantial question.

Section 15, insofar as here pertinent, provides:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

On its face this language gives the district courts discretion and does not make any particular form of relief mandatory. On the contrary, by granting to the district courts jurisdiction in equity to prevent and restrain violations of the Clayton Act, it clearly implies that those courts possess the traditional flexibility of equity courts to fashion the relief appropriate to the particular case. See *Hecht Co.* v. *Bowles*, 321 U.S. 321.

That the district courts possess "large discretion" was explicitly recognized by this Court in remanding the case at bar to the District Court. The Court stated (353 U.S. at p. 607-608):

> "The judgment must therefore be reversed and the cause remanded to the District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401."

The references to "equitable relief necessary and appropriate", "equitable decrees" and "large discretion" to conform the judgment "to fit the exigencies of the particular case" certainly imply that the District Court was not bound to grant the government one particular form of relief, with discretion merely to work out the details.

The background and history of Section 15 and the cases applying the statutory provision from which its language was taken also establish that the District Court was not confined to one form of remedy. Section

15 is identical with the cognate provisions of other principal antitrust acts over which the district courts also have a primary jurisdiction—the Sherman Act (U.S.C. Title 15, Sec. 4) and the Wilson Tariff Act (id., Sec. 9):

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act * * *."

As its legislative history proves, Section 15 was intended by Congress to be "a reenactment of Section 4" of the Sherman Act,[3] which, by 1914, had already been construed several times in major litigation as giving to courts general discretion in the framing of decrees and as not requiring divestiture or dissolution in all cases of unlawful combinations, if there was another effective remedy available. *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U.S. 383; *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 746-747 (N.D. Ohio 1913), 217 Fed. 656 (N.D. Ohio 1914), *appeal dismissed*, 245 U.S. 675 (1917). See also *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185. Under the Sherman Act divestiture is still a remedy "not to be used indiscriminately, without regard to the

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[3] The Senate Committee report on the bill stated (S. Rep. No. 698, 63d Cong., 2d Sess., p. 17 (1914)):

> "Section 13 [which became Section 15] is a reenactment of section 4 of the Act of July 2, 1890, so as to enable the United States to proceed against corporations for the violation of any of the provisions of this Act as it is now authorized by law to proceed against corporations for violation of the Sherman Act."

To the same effect are id., at p. 50; H.R. Rep. No. 627, 63d Cong., 2d Sess., p. 21; 51 Cong. Rec. 14514, 15944, 16321 and 51 Cong. Rec. App. 1181.

type of violation or whether other effective methods, less harsh, are available." *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 603. See also *United States* v. *Minnesota Mining & Mfg. Co.,* 96 F. Supp. 356, 358 (D. Mass. 1951).[4]

That principle was applied in a recent Section 7 suit seeking equitable relief under Section 16 of the Clayton Act, in which the court enjoined the voting of the stock, and concluded that divestiture was unnecessary. *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd,* 259 F. 2d 524 (2d Cir. 1958). No reason appears for the application of a different principle to cases brought under Section 15; in fact the same result was reached in a case under that section in which stock of one of eight companies acquired in violation of Section 7 was allowed to be retained. *United States* v. *New England Fish Exchange,* 258 Fed. 732 (D. Mass. 1919), 292 Fed. 511 (D. Mass., 1923). Indeed, the Department of Justice itself has settled many Section 7 cases on terms which recognize that divestiture of property acquired in violation of Section 7 is not relief required as a matter of law.[5]

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[4] The Sherman Act cases cited by appellant (Jur. St., p. 9) stand only for the proposition that district courts *may* order divestiture, not that they must do so. Appellees agree that district courts, under Section 15 as under Section 4, are clothed with unqualified authority to issue whatever decree may be necessary in a particular case.

[5] United States v. Schenley Industries, Inc., CCH Trade Cases, Par. 68,664 (D. Del. 1957) (acquired properties not divested); United States v. General Shoe Corp., CCH Trade Cases, Par. 68,271 (D. Tenn. 1956) (same); United States v. Hilton Hotels Corp., CCH Trade Cases, Par. 68,253 (N.D. Ill. 1956) (divestiture of other property); United States v. Minute Maid Corp., CCH Trade Cases, Par. 68,131 (S.D. Fla. 1955) (only part of acquired property divested).

Nevertheless, appellant now argues that district courts must order divestiture in all cases where a violation of Section 7 has been found. Appellant's argument, in brief, contains two steps. First, it contends that Section 11 of the Clayton Act,[6] which by its terms is applicable only to the enforcement of the Act by administrative agencies such as the Federal Trade Commission and the Interstate Commerce Commission, and not to enforcement by the district courts, makes total divestiture mandatory upon a finding of violation of Section 7. Solely on that premise, it asserts that it is "only reasonable to conclude that Congress contemplated the same type of remedy" under Section 15, notwithstanding the fact that the latter section is applicable only to district courts and not to administrative agencies, and that, as has been seen, its language contains no suggestion that divestiture is mandatory.

Neither the premise nor the conclusion of appellant's argument can be supported. Section 11 has never been held to exclude all discretion as to divestiture from the administrative agencies to which it refers.[7] The

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[6] The relevant text of the section is set out in the Appendix.

[7] The cases cited by appellant (Jur. St., pp. 8-9) do not hold to the contrary. Federal Trade Commission v. Western Meat Company, 272 U.S. 554, raised the question whether, in light of the fact that under Section 7 (as it then existed) the Commission had no power to deal with assets previously acquired as a result of an unlawful stock acquisition, the Commission could properly order stock to be divested in such a manner as to thwart the respondent's admitted intention to use the acquired stock to obtain title to the underlying assets. See 272 U.S. at p. 559. Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 291 U.S. 587, also cited by appellant, in fact sanctions the retention by the respondent of the stock of one of two companies illegally acquired. See 16 F.T.C. 393 (1932), aff'd, 65 F.2d 336 (2d Cir. 1933).

agencies themselves have refrained from ordering total divestiture when effective relief in a Section 7 case could be achieved without it.[8]

The conclusion, moreover—that Section 11 is to be the measure of Section 15—has even less substance than the premise. It has already been demonstrated (pp. 6-9, *supra*) that the language and history of Section 15 do not make divestiture mandatory. Certainly it is most unlikely that Congress would limit the historic powers of the Federal courts by a new statute directed in terms solely to the procedure of administrative agencies and which does not even refer to the authority of the district courts. Irrespective of how Section 11 is interpreted, nothing in the language or history of the Clayton Act indicates that any limitations imposed on administrative agencies are applicable to courts proceeding under Section 15.

The court below (Opinion, p. 22) points out the anomalous result which would flow from acceptance of appellant's argument. District courts would be compelled to order divestiture upon proof of a mere ten-

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[8] *Federal Trade Commission*: In the Matter of Union Bag & Paper Co., 52 F.T.C. 1278 (1956) (some of acquired stock not divested); In the Matter of Vendo Co., FTC Dkt No. 6646 (1957) (only part acquired property divested); In the Matter of International Paper Co., FTC Dkt. No. 6676 (1957) (same); In the Matter of Scovill Mfg. Co., FTC Dkt. No. 6527 (1956) (same); In the Matter of Gulf Oil Corp., FTC Dkt. No. 6689 (1960) (same); In the Matter of Diamond Crystal Salt Co., FTC Dkt. No. 7323 (1960) (same); In the Matter of Arrow-Hart & Hegeman, Inc., 16 F.T.C. 393 (1932), aff'd, Arrow-Hart & Hegeman v. Federal Trade Commission, 65 F.2d 336 (2d Cir., 1933), rev'd on other grounds, 291 U.S. 587 (same). *Interstate Commerce Commission*: Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 183 I.C.C. 165 (1932) (divestiture of only voting rights); New York, Chicago and St. Louis R.R. Co. Control I.C.C. Finance Docket No. 17883 (1958) (same).

dency to monopoly in violation of Section 7 of the Clayton Act, whereas divestiture would be discretionary where actual monopoly existed in violation of the Sherman Act.

We submit therefore that the court below properly rejected the contention that its powers had been circumscribed.

II

THE FINAL JUDGMENT IS ENTIRELY ADEQUATE AND WAS A REASONABLE EXERCISE OF THE DISTRICT COURT'S DISCRETION

Alternatively, appellant contends that if the District Court had discretion to refuse to order complete divestiture in this case, it abused that discretion. The argument runs that the court has formulated an order which accords less than effective relief, and has done so on the basis of factors which it either should have ignored, or which it has exaggerated. On the contrary, the judgment below fully complies with the mandate of this Court that the decree should eliminate "the effects of the acquisition offensive to the statute" (353 U.S. at p. 607). The proposals made by appellant which the court rejected were properly found to be not only unnecessary but also harsh and unduly oppressive.

As we have indicated above, this Court in remanding the case for a further hearing on the equitable relief necessary and appropriate, commented upon the "large discretion" which the courts may exercise in framing equitable decrees. The court below exercised that discretion only after securing all possible assistance and guidance. After appellant's proposed decree was filed, the *amici* suggested, and the court approved, the obtaining of an official Treasury Department ruling

as to the tax consequences of that decree. Thereafter the court received proposed decrees not only from appellees, but also from each of the *amici* on the basis of the authority given them to make independent investigations into the entire range of decree problems. The court's 101-page opinion, which constituted its findings of fact and conclusions of law, evidences both its full awareness of its responsibility under the mandate of this Court, and its appreciation of the realities of the problems with which it was required to grapple. The judgment accepts some of the principles from each of the proposed plans and includes injunctions against trade preferences considerably broader than those proposed by appellant in its plan.

Appellant's assertion that the court "subordinated the interests of the public" (Jur. St. p. 16), is contrary to fact. While noting (Opinion, p. 18) that "During the delay of over thirty years in filing this lawsuit, the rights of over a million stockholders of these corporations have intervened," the court nonetheless acknowledged that "This does not mean that the private interests of the stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful." The court believed, however, that "the primary public purpose should be achieved so far as possible without inflicting unnecessary injury upon innocent stockholders". This is in accord with the teachings of this Court. *United States* v. *American Tobacco Company*, 221 U.S. 106, 185; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 604.[9]

[9] The court declined (Opinion, pp. 18-19) to mitigate or qualify its responsibility for framing an effective decree either because the acts found to be unlawful might reasonably have been thought permissible when they were done (*cf.* United States v. United

1. Appellant has failed to show that the court below, notwithstanding its accurate appreciation of its duty, has entered an ineffective decree. This Court's opinion (353 U.S. 586) demonstrates clearly that the "offensive effects" of the acquisition lay in the power which du Pont could exercise, as a voting stockholder of General Motors, to influence the selection of directors and officers of General Motors who might favor du Pont as a supplier of automotive finishes and fabrics. The decree entered by the lower court eliminates those "offensive effects".

As we have indicated in the Statement, *supra*, du Pont is divested of all voting rights in its General Motors stock, and those rights are vested in the more than 200,000 separate du Pont stockholders. Article VII. Responsive to a contention by appellant that there would remain a small group of du Pont stockholders potentially able to influence General Motors, by voting in concert, the court completely disfranchised not only the two holding companies, Christiana and Delaware, but also "all persons who are directors or officers of du Pont, Christiana or Delaware, and the members of the family of any such officer or director who reside in the same household with him". This disfranchisement, moreover, extends not only to the votes which would otherwise have been derived from their du Pont stockholdings, but also to voting rights on any General Motors stock which they hold directly or as to which they have the power to vote or to direct the vote. Article VI A; and see Article X. All interlocking directorships between General Motors, on the

States Gypsum Co., 340 U.S. 76, 89-90) or because of the recognition by this Court in its opinion in this case (353 U.S. at p. 607) that all concerned in high executive posts "acted honorably and fairly * * * without any design to overreach anyone".

one hand, and du Pont, Christiana and Delaware, on the other hand, are forbidden. Article IV A. More than that, General Motors may not have as a director, officer or employee any person who hereafter serves as a director or officer of du Pont, Christiana or Delaware; General Motors may not share any employee with any of the three latter companies, nor may any of the latter nominate a director of, or propose any person for an office in, General Motors. Article IV A-C.

The decree which has been entered, in other words, deprives du Pont of all attributes and incidents of stock ownership which could in any possible way be used to influence the course of commercial relations between du Pont and General Motors. In addition, it contains stringent injunctions—more drastic than those proposed by appellant—against dealing by du Pont and General Motors with each other on a non-competitive basis. Article V. This, together with the absence of any evidence that retention by du Pont of the bare legal title to the stock could or would have any effect on the commercial practices of General Motors, led the court below—properly, we submit—to conclude that the divestiture of that bare legal title was unnecessary. (See Opinion, pp. 89-92.)

What remains in du Pont, as the Government recognizes (Jur. St., p. 10), is "an investment in General Motors." [10] Section 7 itself supplies the answer to the charge that this reflects an abuse of discretion by the court below. That section is expressly inapplicable to

[10] Even this may be an overstatement. Since the dividends to du Pont on the General Motors stock will be passed on to du Pont stockholders (see note 2, supra), a more accurate statement of the situation created by the decree would be that the du Pont stockholders have an investment in General Motors, with du Pont having physical custody of the certificates.

stock held "solely for investment," which is not used "by voting or otherwise" to lessen competition.

Appellant's further suggestion—that the voting of General Motors stock by du Pont stockholders other than those expressly disfranchised "must result in decisions [by General Motors management] favoring du Pont" (Jur. St., pp. 10-11)—is even less persuasive. The suggestion necessarily assumes that the injunctive provisions of the decree will be ineffective—an assumption which the court below expressly rejected (Opinion, pp. 91-92). It ignores the fact that under Article V of appellant's own proposed decree, the du Pont stockholders (other than Christiana, Delaware and the stockholders of Delaware) would, during the period of distribution, have been entitled to vote all of the General Motors stock owned by du Pont, and ultimately would have received more than two-thirds of that stock, so that the effect would have been substantially the same as that to which the appellant now objects. There is no basis whatever for believing that the more than 200,000 du Pont stockholders who will exercise the right to vote the General Motors stock will act in concert, nor for the assumption made by appellant that the management of General Motors will be influenced because of their vote to make commercial decisions favoring du Pont.

The case upon which appellant relies—*Continental Insurance Company* v. *United States*, 259 U.S. 156—does not suggest a different result. There two corporations—a railroad and a coal company—were to be separated because of the illegal ownership by a holding company of all of the stock of each of them. The decree of the district court, which the Government approved, permitted the two companies to remain jointly liable on a large pre-existing mortgage secured

by the properties of both companies. This Court, taking note of changes which had occurred in the financial situation since the entry of the district court's decree, ordered that the obligation under the mortgage should be modified to make each company liable only for its *pro rata* share. Had both companies continued jointly liable, each company would have been liable for the obligation of the other, a situation which might easily have induced each to conduct its operations with an eye to the advantage of the other. Here, however, as the court below observed (p. 92), General Motors has no financial interest in du Pont and has no incentive which would operate to influence a General Motors employee to favor du Pont in any way.[11]

2. Moreover, the decision by the court below to leave legal title to the stock in du Pont was not a judgment made in an economic vacuum. Appellant's almost casual reference to "the impact of federal income taxes" and to "market disorders" apparently seeks to mask the enormous penalties which would be imposed on the stockholders of both du Pont and General Motors were appellant's proposals to be adopted.[12]

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[11] The provision in the decree of the District Court in the *Continental Insurance* case requiring the purchasers of the stock of the coal company to certify that they were not stockholders of the railway company reflects the fact that 100 per cent of the stock was to be sold, and hence safeguards were needed to prevent common control from again being obtained by the same interests.

[12] In another context, the Acting Assistant Attorney General in charge of the Antitrust Division, in pointing out the obstacles which the tax laws present to securing the relief which the Division wants in antitrust cases, has testified that "there is real basis for concluding that some benchmark antitrust divestiture cases • • • might well not have been decreed had today's tax rates prevailed." Hearings before the Committee on Ways and Means, House of Representatives, on H.R. 8126 (86th Cong., 1st Sess., July 20-21, 1959) p. 18.

The nature of these penalties is fully described in the opinion of the court below. Under the ruling of the Internal Revenue Service, du Pont individual stockholders and trusts owning du Pont stock would be taxed by the Federal Government at rates varying from 20 to 91 per cent (less dividends received credit) on the current market value of the shares received. In many cases there would also be substantial additional state taxes. On the basis of a careful survey which the court below found reliable (Opinion, p. 28), the court concluded that the Federal income taxes alone would total approximately one billion dollars if the General Motors stock were to have an average value of about $50 per share during the 10 years of the Government's plan, and $770,000,000 if it were to have an average value of about $40 per share during that period. (Opinion, p. 28.) To this total would be added income and capital gains taxes in excess of $200,000,000 which would be imposed upon Christiana and Delaware. (Opinion, pp. 32-33.) The enormity of the amounts to be exacted from individuals in taxes is apparent when they are contrasted with the maximum criminal penalty which Congress has prescribed for an antitrust violation—$50,000.

The tax penalties, moreover, would be accompanied by a decade of market disruption and decline in the market price of both General Motors stock and du Pont stock. The court below noted (Opinion, pp. 34-35, 98) the serious impact such a decline would have, on the more than 700,000 stockholders of General Motors (Opinion, p. 16), on the 230,000 direct and beneficial owners of du Pont stock (*ibid.*), on Christiana and Delaware, and indeed on the ability of General Motors itself to carry out needed financing. Even a decline of 10 per cent in the market value of General Motors

stock, which one of appellant's own witnesses conceded to be likely (Opinion, pp. 40-41), would amount to more than $1,400,000,000 if the stock were selling at $50 per share. Defendants' witnesses, whom the court credited (Opinion, pp. 98, 46-62), estimated that the decline would be up to two or three times as great. After a careful review of all the evidence adduced on the extent and nature of the market disruption, the court noted that even on the appellant's own evidence there would be a serious risk of substantial losses "to the many thousands of direct or indirect holders of such stocks who cannot conceivably be called guilty persons or even persons aware of any illegality". (Opinion, p. 98.) The court, it added, "will not assume the responsibility of such risk".[13]

The decisions of this Court teach that the "public interest", which is the critical concern of a court of equity in antitrust cases, comprehends the avoidance of unnecessary penalties on investors large and small. *United States* v. *Terminal Railroad Association*, 224 U.S. 383; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185; *United States* v. *United States Steel Corp.*, 251 U.S. 417, 452-453. See also *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 604. Having found that the remedy of divestiture of all but legal title to the stock, reinforced by injunctions, would be effective, the court was not required to assume a legal blindfold as to the adverse tax and other consequences

[13] Appellant suggests (Jur. St., p. 13n) a number of "devices for distribution" which it asserts would permit du Pont to be divested of its bare legal title in the General Motors stock "without disastrous results". Some of these devices were explored in the hearing below and have been considered by the court (see *e.g.*, Opinion, pp. 39, 40-46); others are no more than minor modifications. Appellant does not suggest, moreover, that any of them will avoid the harsh tax consequences.

of appellant's proposal. *United States* v. *Minnesota Mining & Manufacturing Co.*, 96 F. Supp. 356, 357-358 (D. Mass. 1951). Taking all facts into account, the court was fully warranted in refusing to order the divestiture of du Pont's remaining bare legal title when it concluded that such a course was not necessary to eliminate the effects of the acquisition offensive to the statute, and was "unnecessarily harsh and punitive". (Opinion, p. 99.) *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 and *International Boxing Club* v. *United States*, 358 U.S. 242, cited by appellant (Jur. St., pp. 14-15) are not to the contrary. In each of those cases the Court refused to set aside a judgment by a district court which had concluded that it was essential to an effective decree to divest stock owned by persons who had themselves been found guilty of antitrust violations. In each case the Court held that the district court had not abused its discretion in ordering divestiture, not that it was required to divest. The cases have no application to the present situation in which the lower court has found that fully effective relief does not require the divestiture from du Pont of the bare legal title to the General Motors stock and in which the penalties would fall upon more than one million innocent stockholders.

It is axiomatic that the purpose of a decree in equity should be remedial and not punitive. But even punishment should bear some relationship to legal or moral responsibility. Little can be said for punishment which is inflicted indiscriminately upon thousands of shareholders of du Pont without regard to when they bought their stock, or to their responsibility for the act found to have violated the law, and where the impact on a particular stockholder depends simply on the number of shares he holds and the tax bracket in which he

happens to fall in a particular year. Even less can be said for a judgment which inflicts property losses upon thousands of shareholders of General Motors who had no responsibility, real or imputed, for the events which led to this litigation.

3. Finally, appellant fails to mention two salient features of the decree, each of which attests to the concern of the court that it comply fully with the mandate of this Court.

In its opinion and findings, the court below directed (p. 101) that the decree contain provisions for reconsideration "in the event the provisions thereof should prove in the future to be inadequate to curb the violation". Pursuant to that directive, the judgment provides, in Article IX, that—

> "if the provisions of this Judgment should prove inadequate to remedy the violation of the Clayton Act, any party hereto may apply to this Court for modification of this Judgment in light of the circumstances then existing."

This is, of course, more than a standard retention of jurisdiction. Rather, it is a recognition by the court of the unique character of the problems with which it was faced, and of its continuing responsibilities to safeguard the public interest by whatever measure of relief the future course of events may show to be necessary.

The other feature ignored by appellant is similar. Taking note of the fact that Congress was currently considering amendments to the tax laws which would eliminate or greatly reduce taxes incident to divestitures required by antitrust decrees, the court also included (Article IX) a provision permitting any party to apply for modification of the judgment in the event

amendments were enacted which could make a distribution or disposition of the General Motors stock feasible and equitable. These tax proposals are still before the Congress,[14] and may, if acted on favorably, permit a resubmission to the District Court which might render moot the objections to the judgment which appellant now urges.

In sum, appellant is free at any time in the future to renew its proposal in the court below. It may do so whenever it believes that events, rather than speculation, demonstrate the need for further relief, or whenever, by reason of changes in the tax laws, it believes it will be possible, without harsh penalties on innocent investors, to require du Pont to dispose of the title to the General Motors stock. To require more than that is to exalt form over substance; to impose penalties without any evidence that they are necessary to remedy the violation; and to assume that the District Court is less than sensitive to its responsibilities.

In remanding this case for hearings on the question of relief, this Court stated that the court below was "clothed with large discretion" in formulating its decree; that statement would have been meaningless if divestiture were mandatory. We respectfully submit that, on this record, divestiture was both unnecessary and unreasonable, so that the lower court could not sensibly have exercised its discretion except as it did. The question before this Court, however, is merely whether that discretion was abused. Clearly it was not.

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[14] H.R. 8126 has been reported favorably by the Ways and Means Committee, H.R. Rep. No. 1128, 86th Cong., 1st Sess. In the Senate, S. 200, as amended, has been the subject of hearings, but no report has issued.

CONCLUSION

The judgment below, in the best traditions of equity, protects millions of innocent stockholders against the serious losses that would be forced upon them if divestiture of the bare legal title were ordered at this time. No showing can be made that the imposition of these losses upon individuals will contribute to the effective enforcement of the antitrust laws. The objections now made are insubstantial and, in a real sense, premature. The judgment below should be affirmed.

Respectfully submitted,

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